A **SILVERON BUILDERS SDN BHD v. YHL PROPERTY SDN BHD**

COURT OF APPEAL, PUTRAJAYA
MOHD NAZLAN GHAZALI JCA
CHOO KAH SING JCA
FAIZAH JAMALUDIN JCA
B [CIVIL APPEAL NO: J-02(IM)(NCvC)-194-02-2024]
8 AUGUST 2025

Abstract – *Claim for compensation arising from lodgement of a wrongful caveat, which results in losses to the landowner, ought to be allowed. Section 329(1) of the National Land Code creates a statutory right to compensation where a person suffers loss or damage owing to a caveator's failure to withdraw or remove a wrongful caveat. The compensation is subject to fulfilment of the conditions in s. 329(1). In awarding compensation, the court would consider whether the damages are reasonably foreseeable and mitigating measures were undertaken.*

CONTRACT: *Agreement – Terms – Joint venture agreement – Indemnity obligations – Damages arising from wrongful lodgement of caveat – Caveat resulted in cancellation of loan and refusal to drawdown loan – Developer incurred additional financing costs in obtaining alternative source of financing – Whether clauses in agreement provided for indemnity obligation for losses arising from independent legal wrong of third party – Whether developer ought to be indemnified*

LAND LAW: *Caveat – Wrongful lodgement – Claim for damages arising from wrongful lodgement of caveat – Whether conditions under s. 329(1) of National Land Code satisfied – Whether caveat entered wrongfully or without reasonable cause – Whether actual damages or losses resulted from wrongful lodgement of caveat – Whether caveat frustrated financing arrangements – Whether damages foreseeable – Whether mitigating steps taken – Whether compensation awarded*

G This was an appeal by the appellant regarding the High Court's award of RM748,931.37 in damages to the respondent for wrongful caveat lodged by the appellant on the respondent's land ('land'). The respondent had entered into a joint venture agreement ('JVA') with the developer for the development of a project on the land ('project'). The caveat at issue in this H appeal was the second caveat, wrongfully lodged by the appellant on the land on 18 July 2019. The Registrar of Titles previously removed the appellant's first caveat on the land in 2009. Following the lodging of the second caveat, the respondent's solicitors issued a written notice requesting that the appellant withdraw the caveat and advising that any damages sustained due I to the wrongful caveat could be substantial. The appellant declined to withdraw the second caveat, prompting the respondent to apply to the High Court for its removal. The High Court ordered the removal of the second caveat and for the losses suffered as a result of the caveat to be assessed and

paid to the respondent pursuant to s. 329(1) of the National Land Code ('NLC'). The appellant did not appeal against the High Court's order for removal of the second caveat. Instead, it lodged a third and fourth caveat on the land. However, the appellant's third caveat was subsequently withdrawn, and the High Court ordered the removal of the fourth caveat. Due to the appellant's second caveat on the land, third-party charges, as security for the loan obtained by the developer from Malayan Banking Bhd ('Maybank') and RHB Bank Bhd ('RHB') for the development of the project, could not be registered. Therefore, Maybank cancelled its loan and RHB refused to drawdown the loan whilst the second caveat was still lodged on the title of the land. In order to continue with the development of the project, the developer had to take short-term loans from other sources at a higher interest rate. The High Court compensated the respondent for the wrongful second caveat on the land by awarding the amount the respondent had paid the developer for its additional financing costs caused by the said caveat. In this appeal, the issues for the court's determination were: (i) whether the respondent was contractually obliged to indemnify the developer under the JVA; and (ii) whether the respondent was entitled to compensation under s. 329(1) of the NLC for the sum it had indemnified the developer due to the wrongful caveat on the land.

Held (dismissing appeal with costs)
Per Faizah Jamaluddin JCA delivering the judgment of the court:

(1) Clause 3.1(a) of the JVA was plainly facilitative. It aimed to foster cooperation between the respondent and the developer in matters of administration and execution of the development of the project, rather than to create financial liability. In particular, the phrase 'general assistance' could not be interpreted to include indemnity for losses arising from the independent legal wrong of a third party, such as the lodgement of wrongful caveat. Additionally, cl. 3.1(a) of the JVA did not support an implied indemnity obligation since the clause contemplates procedural and administrative cooperation and not substantive financial liability. The wordings in the clause also did not meet the business efficacy test and officious bystander test required to imply a term in a contract. Therefore, the respondent did not have a contractual obligation under cl. 3.1(a) of the JVA to indemnify the developer for the additional financing costs. (paras 25-27)

(2) Section 329(1) of the NLC creates a statutory right to compensation where a person suffers loss or damage owing to a caveator's failure to withdraw or remove a wrongful caveat. In order for the respondent to succeed in a claim for compensation against the appellant under s. 329(1) of the NLC, two conditions must be met: (i) the private caveat lodged by the appellant was entered either wrongfully or without

reasonable cause; and (ii) the respondent experienced actual damages or losses as a result of the lodgement of the private caveat. As the appellant did not appeal against the decision of the High Court finding that the second caveat was wrongfully entered by the appellant and had ordered for its removal, the respondent had satisfied the first limb of s. 329(1) of the NLC. (paras 29, 33 & 34)

(3) In assessing damages, the relevant considerations are: (i) remoteness of damages; and (ii) mitigation of damages. Compensation may only be awarded for damages which are reasonably foreseeable; it cannot be ordered for all direct consequences of a wrongful act. It is reasonably foreseeable that a financier would not proceed with its financing/loan arrangements because a charge in its favour – as security for the loan – cannot be registered on any land that has a caveat on its title. The appellant's second caveat on the land frustrated the financing arrangements. Consequently, it was foreseeable that the developer had to look for an alternative source of financing in order to continue the development and construction works. The respondent's indemnification of the additional financing costs, *ie*, the difference between the interest rates charged under the Maybank and RHB loans and the short-term financing the developer had to incur and the stamp duty paid for the cancelled Maybank loan, was reasonably foreseeable and a necessary measure to mitigate the losses suffered as a result of the wrongful second caveat on the land. (paras 41, 43, 44, 46 & 48)

(4) But for the appellant's wrongful caveat, there would not have been any cancellation of the Maybank loan and disruption in the drawdown of the RHB loan – there would not have been any need for the respondent to indemnify the developer for the additional financing costs incurred in order to mitigate its losses. The respondent was forced to indemnify the developer due to the wrongful caveat lodged by the appellant on the land. The respondent's indemnification of the developer was a commercially necessary response to mitigate the foreseeable financial losses caused by the appellant's wrongful caveat on the land, which had exposed the respondent to a breach of the JVA and the project to higher financing costs and potential delay in completion. (para 53)

(5) The respondent was entitled to recover the amount that it had paid to indemnify the developer for the additional financing costs incurred owing to the wrongful caveat, even though there was no express indemnity clause in the JVA. The respondent's entitlement was based on the compensatory principle in s. 329(1) of the NLC in order to place the respondent in the same financial position it would have been had the appellant not lodged the wrongful caveat on the land. Accordingly, the HCJ did not fall into error in awarding the respondent compensation. (paras 54-56)

Case(s) referred to:

Cheng Chin Chong v. Shak Heng & Sons Sdn Bhd [1981] CLJ 91; [1981] CLJ (Rep) 126 HC ***(refd)***

Lo Foi v. Lee Ah Hong & Ors [1998] 1 CLJ Supp 244; [1998] 1 BLJ 244 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Mawar Biru Sdn Bhd v. Lim Kai Chew [1992] CLJU 22; [1992] 1 LNS 22 HC ***(refd)***

Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd (The Wagon Mound) [1961] AC 388 ***(refd)***

Quill Construction Sdn Bhd v. Tan Hor Teng & Anor [2003] 7 CLJ 24 HC ***(refd)***

Reigate v. Union Manufacturing Company (Ramsbottom), Limited And Elton Cop Dyeing Company, Limited [1918] 1 KB 592 ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong (Sued Pursuant To s. 9(c) of The Societies Act, 1966 In His Capacity As The Chairman Of The Kelab Lumba Kuda Sandakan) [1995] 3 CLJ 256 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74

National Land Code, s. 329(1)

For the appellant - Mohammad Danial Hazizan; M/s S Ravenesan

For the respondent - Wong Wan Ting; M/s Gan & Lim

[Editor's note: For the High Court judgment, please see YHL Property Sdn Bhd v. Silveron Builders Sdn Bhd [2024] CLJU 400 (affirmed).]

Reported by S Barathi

JUDGMENT

Faizah Jamaludin JCA:

Introduction

[1] This is an appeal by the appellant regarding the Johor Bahru High Court's award of RM748,931.37 in damages to the respondent, related to a wrongful caveat lodged by the appellant on the respondent's land under master title geran no. 75853, Lot No. 15309, Daerah Johor Bahru, Bandar Johor Bahru, Negeri Johor Darul Ta'zim ("land").

[2] The main issue in this appeal is whether the appellant is liable to pay the respondent compensation under s. 329(1) of the National Land Code ("NLC"), specifically for an amount equal to what the respondent paid the developer for additional financing costs arising from the appellant's wrongful caveat on the land.

Background Facts

[3] The respondent had entered into a joint venture agreement ("JVA") with Vistana Tropika Sdn Bhd ("the developer") on 8 June 2018 for the development of a project on the land ("the project").

[4] The caveat at issue in this appeal is the second caveat, which was wrongfully lodged by the appellant on the land on 18 July 2019. The Registrar of Titles previously removed the appellant's first caveat on the land in 2009.

[5] Following the lodging of the second caveat, the respondent's solicitors issued a written notice on 6 December 2019 requesting that the appellant withdraw the caveat from the land title and advising that any damages sustained due to the wrongful caveat could be substantial. Despite this, the appellant declined to withdraw the second caveat, prompting the respondent to apply to the Johor Bahru High Court seeking its removal.

[6] On 15 July 2020, the High Court ordered the removal of the second caveat and for the losses suffered as a result of the caveat to be assessed and paid to the respondent pursuant to s. 329(1) of the NLC.

[7] The appellant did not appeal against the High Court's order for removal of the second caveat. Instead, it lodged a third and fourth caveat on the land. The appellant's third caveat was subsequently withdrawn and the High Court on 5 October 2020 ordered the removal of the fourth caveat.

[8] Under cl. 4.1 of the JVA, the developer may obtain loan facilities from financial institutions for bridging financing related to the development of the project, and the respondent is required to provide the land as security for the loan and to promptly execute charges and other security documents in favour of the financiers. Clause 4.1 states:

> 4.1 The JV Partner shall be allowed to obtain the necessary loan facilities from financial institutions (hereinafter referred to as the "Financier") specifically for bridging financing purposes in the implementation of the Development (hereinafter referred to as the "Loan") with the Owner providing the Said land as security for the Loan granted for the Development. The Owner shall promptly execute all such charges and/or other encumbrances as may from time to time hereafter be required by the JV Partner [the developer] to be created in favour of the Financier in relation to the Loan.

[9] For the purpose of the development of the project, the developer had on 5 July 2019 obtained a loan from Malayan Banking Berhad ("Maybank") for working capital in the sum of RM12,000,000 at the interest rate of 7.65% per annum. On 15 January 2020, it obtained a loan in the sum of RM24,000,000 from RHB Bank Bhd ("RHB") for the purpose of the building construction works of the project at the interest rate of 6.70% per annum.

[10] Both loans were conditional upon the registration of a third-party charge on the land in favour of Maybank and RHB respectively as security for the loans. The respondent is contractually obliged under cl. 4.1 of the JVA to provide the land as security for the loans. The developer had paid stamp duty to the Lembaga Hasil Dalam Negeri ("LHDN") in the sum of

RM60,000 on the respondent's behalf for the registration of the Form 16A (charge instrument) in favour of Maybank for the RM12,000,000 loan. However, because of the appellant's second caveat on the land, the third party charges in favour of Maybank and RHB could not be registered.

[11] As a result of the non-registration of the third-party charge in its favour, Maybank cancelled its loan and RHB refused to drawdown the loan whilst the second caveat was still lodged on the title of the land. In order to continue with the development of the project, the developer had to take short-term loans from other sources for the sum of RM12,000,000 and RM24,000,000 at the higher interest rate of 12% per annum.

[12] The "additional financing costs" borne by the developer (and indemnified by the respondent to the developer), as a result of the second caveat are items (i) to (iv) below. Item (v) was caused by the appellant's third and fourth caveats on the land:

No.	Description	Amount (RM)
(i)	Stamp duty paid for the Maybank Charge instrument that could not be presented due to the caveat.	60,000.00
(ii)	Extra interest on RM12,000,000.00 (for period from 15.12.2019 to 31.12.2019): RM12,000,000.00 x 4.35% pa x 16/365 days	22,882.19
(iii)	Extra interest on RM12,000,000.00 (for period from 01.01.2020 to 15.07.2020): RM12,000,000.00 x 4.35% pa x 197/365 days	280.967.21
(iv)	Extra interest on RM24,000,000.00 (for period from 21.02.2020 to 15.07.2020): RM12,000,000.00 x 4.05% pa x 16/365 days	385,081.97
(v)	Extra interest on RM12,000,000.00 (for period from 16.07.2020 to 27.10.2020): RM24,000,000.00 x 4.05% pa x 103/365 days	273,540.98
	TOTAL	1,022,472.35

[13] The compensation claimed by the respondent at the High Court as damages for the wrongful caveat was RM1,022,472.35. It was the amount of indemnity paid by the respondent to the developer for additional financing costs that resulted from the wrongful second, third and fourth caveats lodged by the appellant on the land. The sum was paid by the respondent to the developer by an AmBank Islamic cheque dated 12 November 2020.

[14] The Johor Bahru High Court only awarded the sum of RM748,931.37, which was the amount of indemnity paid by the respondent to the developer for the additional financing costs as a result of the second caveat. The balance of RM273,540.98 loss was caused by the appellant's third and fourth caveat

on the land. The learned High Court Judge in his para. 15 of his grounds of judgment held that as the costs in item (v) above was caused by the appellant's third and fourth caveats, the said sum will be the subject-matter of a separate claim by the respondent against the appellant.

[15] The appellant, being dissatisfied with the High Court's decision, filed this appeal for this court to set-aside the High Court's award of damages to the appellant.

Appellant's Case

[16] The appellant's case is that the High Court was wrong in granting damages to the respondent for the wrongful second caveat on the land. The appellant contends that the additional financing costs suffered as a result of the caveat were the developer's and not the respondent's.

[17] The appellant submits that based on the JVA there were no actual losses suffered by the respondent because under the JVA all expenses are to be borne by the developer. It claims that under recital (C), and cls. 2.1, 4.2, 4.3, 9 and 10 of the JVA that "any and all expenses are to be borne by Vistana (the developer)".

[18] The appellant further submits that the respondent's obligation under the JVA is only to furnish the land for development by the developer. It argues that there is no express requirement under the JVA for the respondent to provide the land free from encumbrances or to indemnify the developer for losses suffered by the latter as a result of any wrongful caveats on the land.

[19] In addition, the appellant submits that since the developer was not party to the proceedings at the High Court, the respondent is improperly pursuing a claim for damages on behalf of the developer, who is a stranger to the proceedings.

[20] Finally, the appellant argues that the respondent failed to mitigate its losses because the developer had accepted the financing facilities offered by RHB through its letter dated 15 January 2020 when the respondent already knew the presence of the second caveat on the land. It contends that the respondent and/or the developer took an unreasonable risk in accepting the bridging loan from RHB.

Respondent's Case

[21] The respondent's case is that the appellant's improper lodging of the second caveat on the land prevented the registration of third-party charges in favour of Maybank and RHB, which were required to secure the loan facilities essential for the development of the project. As a consequence, the developer was compelled to incur the additional financing costs by obtaining alternative loans for its working capital and construction activities related to the project. The respondent contends that under the terms of the JVA, the respondent is obliged to indemnify the developer for these costs.

Issues

[22] The Johor Bahru High Court compensated the respondent for the wrongful second caveat on the land by awarding the amount the respondent had paid the developer for its additional financing costs caused by the said caveat.

[23] The issues for our determination in this appeal are:

(i) whether the respondent is contractually obliged to indemnify the developer under the JVA; and

(ii) whether the respondent is entitled to compensation under s. 329(1) of the NLC for the sum it had indemnified the developer due to the wrongful caveat on the land?

Is There A Contractual Obligation For The Respondent To Indemnify The Developer Under The JVA?

[24] The respondent's counsel had submitted that the respondent is contractually obliged under cl. 3.1(a) of the JVA to indemnify the developer for losses it suffered as a result of the appellant's wrongful caveat on the land. Clause 3.1(a) states:

> The Owner will endeavour to give and render such general assistance and sign and do all such acts and things as may from time to be reasonably required to ensure success of the Development.

[25] From the natural and ordinary meaning of the words in cl. 3.1(a) of the JVA, we find that the clause is plainly facilitative. It aims to foster cooperation between the respondent and the developer in matters of administration and execution of the development of the project, rather than to create financial liability. In particular, the phrase "general assistance" cannot be interpreted to include indemnity for losses arising from the independent legal wrong of a third party, such as the lodgement of wrongful caveat.

[26] In addition, we find that cl. 3.1(a) of the JVA does not support an implied indemnity obligation since the clause contemplates procedural and administrative cooperation and not substantive financial liability. Moreover, the wordings in the clause do not meet the business efficacy test and officious bystander test required to imply a term in a contract: see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong (Sued Pursuant To s. 9(c) Of The Societies Act, 1966 In His Capacity As The Chairman Of The Kelab Lumba Kuda Sandakan)* [1995] 3 CLJ 256; [1995] MLJU 276 HC following the English case of *Reigate v. Union Manufacturing Company (Ramsbottom), Limited And Elton Cop Dyeing Company, Limited* [1918] 1 KB 592.

[27] Therefore, we find that the respondent does not have a contractual obligation under the cl. 3.1(a) of the JVA to indemnify the developer for the additional financing costs.

Is The Respondent Entitled To Compensation Under Section 329(1) Of The NLC?

[28] Although the respondent does not have a contractual obligation to indemnify the developer under cl. 3.1(a) of the JVA, the question is whether the respondent is statutorily entitled to compensation under s. 329(1) of the NLC for the amount paid in indemnifying the developer the additional financing costs due to the wrongful caveat on the land.

[29] Section 329(1) of the NLC creates a statutory right to compensation where a person suffers loss or damage owing to a caveator's failure to withdraw or remove a wrongful caveat. It reads:

> 329. Compensation for wrongful caveats, and limitation on repeated applications
>
> (1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

[30] The applicable legal principles governing claims for compensation under s. 329(1) of the NLC are:

(i) to succeed in a claim for compensation for the wrong entry of a caveat, the claimant must prove to have suffered damage or loss by reason of the wrongful entry: see *Cheng Chin Chong v. Shak Heng & Sons Sdn Bhd* [1981] CLJ 91; [1981] CLJ (Rep) 126; [1982] 1 MLJ 160;

(ii) compensation can only be awarded for actual damages that are reasonably foreseeable. *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2003] 7 CLJ 24 (*supra*); *Lo Foi v. Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244; [1998] 1 BLJ 244; [1997] MLJU 310; and

(iii) courts will not award damages where the claimant fails to prove actual loss. The claimant must prove that the damages suffered are real and actual: *Mawar Biru Sdn Bhd v. Lim Kai Chew* [1992] CLJU 22; [1992] 1 LNS 22; [1992] 1 MLJ 336.

[31] Judith Sihombing in her book, *National Land Code: A Commentary*, 2021 Desk Edition, at para. 1032 states:

> **The subsection [329(1) of the NLC] purports to create compensation whenever a private caveat is wrongfully entered, or allow a caveat to remain on the register**. However, it would see that the better view is that action may be taken only when such entry or failure to withdraw results in actual loss or damage: s. 74 of the Contracts Act 1950 (Act 136) (see Chapter III); *Cheng Chin Chng v. Shak Heng & Sons Sdn Bhd* [1982] 1 MLJ 160.
>
> (emphasis added)

[32] Abdul Malik Ishak J in *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2003] 7 CLJ 24; [2003] 6 MLJ 279, said the following as regards s. 329(1) NLC:

> *In my view, s. 329(1) of the NLC creates a right of action where there is a malicious or a negligent and incorrect entry of a private caveat or a failure to withdraw a private caveat*. But of course, the best view to adopt in construing s. 329(1) of the NLC is this. That an action against any person or body for lodging the private caveat 'wrongfully or without reasonable cause' *would be in a situation where the entry of such private caveat or the failure to withdraw such private caveat would result in actual damage*. Owen J in *Lachaume v. Broughton* [1903] 3 SR (NSW) 475, at p. 480 aptly said:
>
> > *The gist of the action is not the maliciously and falsely setting up a title to property, but the damages that may arise from it*.
> >
> > (emphasis added)

[33] In order for the respondent to succeed in a claim for compensation against the appellant under s. 329(1) of the NLC, two conditions must be met:

(i) the private caveat lodged by the appellant was entered either wrongfully or without reasonable cause; and

(ii) the respondent experienced actual damages or losses as a result of the lodgement of the private caveat.

[34] Given that the Johor Bahru High Court in its decision dated 15 July 2020 had found that the second caveat lodged by the appellant on the land was wrongfully entered and had ordered for its removal – a decision which the appellant did not appeal against – means that the respondent had satisfied the first limb of s. 329(1) of the NLC.

[35] As regards to the second limb of s. 329(1) of the NLC, the question to be answered is whether the respondent suffered actual damages or loss as a result of the appellant's second caveat on the land.

[36] This court in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719; [1995] 2 AMR 969 ("*Luggage Distributors*") held that the private caveat lodged by the respondents in that case, was wrong because as tenants they did not have a caveatable interest in the land, and ordered for the caveat to be removed.

[37] In *Luggage Distributors*, the land owner (Luggage Distributors (M) Sdn Bhd) had entered into a sale and purchase agreement ("SPA") with the purchaser (Quill Construction Sdn Bhd ("Quill")) for the sale of the land and the shophouse on the land ("the property") to Quill. However, because of the wrongful caveat on the land lodged by the respondents, the SPA could not proceed because the charge on the property in favour of Quill's financier could not be registered due to the caveat on the property, and Quill's financier would not drawdown the loan unless and until the charge was registered.

[38] Subsequent to this court's decision in *Luggage Distributors*, Quill brought an action at the High Court against the caveators in *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* (*supra*) for summary judgment of the sum of RM222,548.46 being the interest rate on the balance purchase price owing under the SPA and Luggage Distributor's legal costs for removal of the caveat. Quill had agreed to bear these costs in exchange for not losing their 10% deposit under the SPA. The SAR allowed Quill's claim for the costs and entered summary judgment against the caveators.

[39] The SAR's decision was upheld on appeal to judge in chambers. Abdul Malik Ishak J (as he then was) held:

> *It is also my judgment that the plaintiff needs only to satisfy me that it suffers damage or loss by reason of the entry of the wrongful caveat*. In short, the plaintiff has to prove that it is an aggrieved party. *Here, the plaintiff was the purchaser of the property under the sale and purchase agreement and there was undue delay by reason of the private caveat lodged by the defendants. By reason of that very caveat, it necessitated applications to be made to the courts for its removal before the sale and purchase agreement could proceed ahead*. This is acknowledged by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd* (*supra*) when it said at p. 720 of the report that, 'The existence of any caveat would, of course, frustrate all financing arrangements.' *It goes without saying that the plaintiff has suffered loss and/or damages by reason of the existence of that private caveat*. This was my judgment and I so hold accordingly.
>
> (emphasis added)

[40] The High Court in *Quill Construction* allowed Quill's claim because Quill proved that it had suffered loss and damage as a result of the caveat lodged by the respondents on the property owned by Luggage Distributors, which this court in *Luggage Distributors* held was wrongful. The loss and damage suffered was the additional interest on the balance purchase price Quill had to pay to the vendor and the legal costs for the removal of the caveat.

[41] The High Court affirmed the legal principle that in assessing damages, the relevant considerations are: (i) remoteness of damages; and (ii) mitigation of damages. It is trite that compensation may only be awarded for damages which are reasonably foreseeable: it cannot be ordered for all direct consequences of a wrongful act; see *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388; [1961] 2 WLR 126; [1961] 1 All ER 404; s. 74 of the Contracts Act 1950.

Were The Damages Suffered Reasonably Foreseeable?

[42] In this present case, the question we need to answer is whether the damages suffered by the respondent as a result of the appellant's wrongful caveat reasonably foreseeable.

[43] We find that it was reasonably foreseeable that a financier would not proceed with its financing/loan arrangements because a charge in its favour – as security for the loan – cannot be registered on any land that has a caveat on its title. This situation is similar to that in *Luggage Distributors*, where the presence of the caveat on the property caused the purchaser's financier to refuse the drawdown of the loan for the purchase of the property because a charge in the financier's favour could not be registered on the property due to the caveat. As observed by Gopal Sri Ram JCA (as he then was) in *Luggage Distributors*:

> The existence of any caveat would, of course frustrate, all financing arrangements.

[44] In this present case, the appellant's second caveat on the land frustrated the financing arrangements. Maybank cancelled its loan to the developer, and RHB postponed the drawdown of its bridging loan until the caveat was removed, as a charge in their favour could not be registered while the caveat remained on the land title. The terms of the loans required that a third-party charge in favour of Maybank and RHB, respectively, be registered on the land as security for the loans.

[45] It was equally foreseeable that stamp duty for the Form 16A charge instrument had to be paid to LHDN to register Maybank's charge on the land for the loan. The developer paid this duty on behalf of the respondent, who is the owner of the land and the chargor.

[46] Furthermore, it was foreseeable that the developer would have to look for alternative source of financing to replace the Maybank and RHB loans in order to continue the development and construction works. Any delay in the works would have the knock-on effect of delaying the completion of the project, resulting in breach of the sales and purchase agreements with the buyers of units of the development. Delays in delivery of the units would, among others, cause the developer to pay late payment charges to the buyers. The consequential financial losses to the developer for any delay in the completion of the project is an entirely foreseeable outcome of the wrongful caveat lodged on the land.

[47] In addition, it is foreseeable that any short-term financing will attract a higher interest rate. The developer had to pay a higher interest rate of 12% per annum for the short term loans it had to take to replace the Maybank and RHB loans. We take judicial notice that under the Moneylenders Act 1951, the interest rate for secured loans from licensed moneylenders shall not exceed 12% per annum.

[48] For the reasons above, we find that the respondent's indemnification of the additional financing costs, *ie*, the difference between the interest rates charged under the Maybank and RHB loans and the short term financing the

developer had to incur and the stamp duty paid for the cancelled Maybank loan, was reasonably foreseeable and a necessary measure to mitigate the losses suffered as a result of the wrongful second caveat on the land.

Mitigation Of Damages

[49] This court in *Luggage Distributors* recognised that reasonable mitigation costs, namely the additional interest on the balance of purchase price because of the delay in completion of the sale caused by the wrongful caveat and the legal fees incurred in removing the caveat are recoverable as part of the statutory compensation under s. 329(1) of the NLC. Gopal Sri Ram JCA (as he then was) in *Luggage Distributors* emphasised the compensatory nature of damages under s. 329(1) of the NLC: namely, restoring the party to the financial position they would have been had the wrongful caveat had not been lodged.

[50] This principle extends to losses that are reasonably incurred in order to mitigate the negative financial impact of the wrongful caveat lodged on any land.

[51] In this present case, due to a wrongful caveat, the third party charges in favour of Maybank and RHB could not be registered on the land, resulting in the respondent's failure to fulfil its obligations under cl. 4.1 of the JVA, where it is contractually required to provide the land as security for the loans and to execute all charges required by the developer to be created in favour of the financiers providing the loans. Accordingly, the respondent had to indemnify the developer to mitigate the losses caused by its breach of cl. 4.1 of the JVA and to preserve the commercial viability of the project.

[52] We find the appellant's argument that the respondent failed to mitigate its losses by the developer accepting the financing facilities offered by RHB, despite being aware of the caveat on the land, to be entirely without merit. Preventing the developer from accepting the RHB loan – which is essential for the progression of the project – solely on account of the appellant's wrongful caveat on the land is neither commercially reasonable nor consistent with the terms of the JVA.

[53] But for the appellant's wrongful caveat, there would not have been any cancellation of the Maybank loan and disruption in the drawdown of the RHB loan – there would not have been any need for the respondent to indemnify the developer for the additional financing costs incurred in order to mitigate its losses. The respondent was forced to indemnify the developer due to the wrongful caveat lodged by the appellant on the land. The respondent's indemnification of the developer was a commercially necessary response to mitigate the foreseeable financial losses caused by the appellant's wrongful caveat on the land, which had exposed the respondent to a breach of the JVA and the project to higher financing costs and potential delay in completion.

Conclusion

[54] Therefore, for these reasons, we find that the respondent is entitled to recover the amount that it had paid to indemnify the developer for the additional financing costs incurred owing to the wrongful caveat, even though there is no express indemnity clause in the JVA.

[55] The respondent's entitlement is based on the compensatory principle in s. 329(1) of the NLC in order to place the respondent in the same financial position, it would have been had the appellant not lodged the wrongful caveat on the land.

[56] Accordingly, we find that the learned High Court Judge did not fall into error in awarding the respondent compensation in the sum of RM748,931.37 with interest at the rate of 5% per annum from 15 July 2020 until full payment.

Decision

[57] Therefore, for these reasons, we uphold the High Court's decision dated 9 January 2024 and dismiss this appeal with cost.